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California Employers Must Reimburse Employee Cell Phone Expenses

By Jamie L. Lopez

Cell phones are an undeniable part of many people's lives. In fact, around the world, there are now more cell phones in circulation than land lines in use. These days, cells phones have become intertwined between an employee's personal and business life. To what extent does an employer need to pay for the use of that phone, especially if the employee incurs no extra expense for making or taking a few business-related calls? According to a California appellate court's recent ruling in *Cochran v. Schwan's Home Service, Inc.*, employers in California must reimburse the employee for use of their personal cell phone when used for business purposes. 228 Cal.App.4th 1137 (2014).

Colin Cochran worked as a customer service manager for Schwan's Home Service, Inc., a food delivery provider. As part of his job, he used his personal cell phone to make business calls. Schwan's did not reimburse him for it. Cochran filed a class action against Schwan's on behalf of all customer service agents who were not reimbursed for use of their personal cell phones. He alleged that Schwan's had violated California Labor Code section 2802, which requires employers to reimburse employees for business-related expenses.

Cochran moved to certify the class, and Schwan's moved to deny certification. At the hearing, the trial court found that the class had

too many individualized issues to be treated as a class action. While some employees may have incurred added cell phone expenses, others may have unlimited minutes plans, in which case there would be no added expense. Further, others may be part of a family plan or have third parties who were paying for their phone bills. Some may have upgraded their phones or plans specifically for work purposes.

On appeal, the Second Appellate District reversed the ruling, finding that the class should be certified. It found the threshold question to be: "Does an employer always have to reimburse an employee for the reasonable expense of the mandatory use of a personal cell phone, or is the reimbursement obligation limited to the situation in which the employee incurred some extra expense that he or she would not have otherwise incurred absent the job?" The court found that reimbursement is always required. According to the court, questions such as the particulars of an individual's cell phone plan or who pays the actual bill are questions about damages and not an employer's liability. The court's reasoning focused on the benefit to the employer instead of the actual expense to the employee. "Otherwise the employer would receive a windfall because it would be passing its operating expenses onto the employee."

As demonstrated by this case, failure to reimburse California employees for required use of personal cell phones for business purposes can give rise to liability, including possible class action litigation. In light of the ruling, employers should revisit their own policies to ensure that they will not find themselves running afoul of California's Labor Code.

Although *Cochran* has left a number of questions unanswered, there are a few actions employers can take to reduce their risk of liability in similar circumstances. *Cochran* does not address what "mandatory" use of personal cell phones for business purposes actually means. However, an employer can be certain that duties and policies that require employees to make or take calls, receive or send emails and texts, check-in by phone while on the job, or otherwise use their personal phone where no other device is available, will require employer reimbursement for personal cell phone use.

In an age where most employees already possess their own personal device, many employers have opted to allow employees to use those devices for business purposes as well. The major focus with Bring Your Own Device (BYOD) policies in the past has been information and device security. However, with this ruling, reimbursement becomes just as important for employers with workers in California.

Cochran does not address the question of what reasonable

reimbursement looks like. That will likely be the subject of future litigation. However, it is imperative that employers examine and develop reimbursement policies with strong, defensible reasoning behind them. Two reimbursement methods that many employers have used are payment of a lump sum based on average use or the cost of an average data plan, or payment of actual expense of a phone and usage plan. Whatever method is chosen, employers should take care to ensure that employees' actual expenses are adequately reimbursed. Employers should make certain there is also a method by which employees can claim additional reimbursement if their actual expenses exceed the usual reimbursement amount. Another way to avoid reimbursement issues, and issues regarding device and information security, is to issue company cell phones to employees whose duties require them and enact policies prohibiting the use of personal phones for company business. Employers with questions on their policies should consult an employment attorney.

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